

STATE OF MICHIGAN  
COURT OF APPEALS

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JOHN DOE,

Plaintiff-Appellee,

v

ROMAN CATHOLIC ARCHBISHOP OF THE  
ARCHDIOCESE OF DETROIT, an Ecclesiastical  
entity,

Defendant-Appellant.

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FOR PUBLICATION  
December 21, 2004  
9:10 a.m.

No. 249394  
Wayne Circuit Court  
LC No. 02-242117-NO

Official Reported Version

Before: Cavanagh, P.J., and Kelly and H. Hood\*, JJ.

H. HOOD, J., (*concurring in part and dissenting in part*).

I must respectfully dissent from that portion of the majority opinion that concludes that summary disposition is warranted with respect to plaintiff's fraudulent-concealment claim. Plaintiff argues that the period of limitations should be tolled because defendant engaged in fraudulent concealment of plaintiff's causes of action against defendant. Specifically, plaintiff alleged that defendant affirmatively misrepresented "Burkholder as a priest or spiritual counselor, fit to serve his duties in the Church, and by allowing him to continue to act as a Priest despite complaints made by other parishioners of sexual abuse." Plaintiff further alleged:

69. The Archdiocese further concealed Burkholder's sexual abuse activities by continuing to relocate him to different Churches within the community that had no knowledge of Burkholder's behavior, as described herein.

70. By engaging in activities to conceal the sexual abuse activities of Burkholder, the Defendants impliedly or expressly condoned his behavior thereby supporting Burkholder's explanations to Plaintiff that his sexual activities with Plaintiff were natural, approved of by God and the Church.

Before analyzing plaintiff's argument, it is important to note that plaintiff's complaint implicates defendant's actions both before the alleged abuse and after. Plaintiff alleges that defendant's action or inaction before the alleged abuse gives rise to causes of action against defendant for the abuse suffered. Plaintiff also alleges that defendant's actions after the alleged

abuse operated to conceal from plaintiff the causes of action against defendant. It is apparent that the reassignment of Burkholder before plaintiff was abused does not prove fraudulent concealment, although that may be evidence that defendant was aware of Burkholder's conduct. However, plaintiff alleges that, after the abuse, defendant continued to move Burkholder to churches in other communities that had no knowledge of his behavior. Furthermore, he alleges that defendant fraudulently represented Burkholder as a priest who was fit to carry out his duties, despite the complaints made against him. Thus, plaintiff alleges that defendant continued to conceal Burkholder's activities and to condone his behavior.

The fraudulent-concealment rule, found in MCL 600.5855, provides as follows:

If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

Under MCL 600.5855, "the statute of limitation is tolled when a party conceals the fact that the plaintiff has a cause of action." *Sills v Oakland Gen Hosp*, 220 Mich App 303, 310; 559 NW2d 348 (1996). To invoke this provision, "there must be concealment by the defendant of the existence of a claim or the identity of a potential defendant." *McCluskey v Womack*, 188 Mich App 465, 472; 470 NW2d 443 (1991). "[T]he fraud must be manifested by an affirmative act or misrepresentation." *Witherspoon v Guilford*, 203 Mich App 240, 248; 511 NW2d 720 (1994). Thus, "[t]he plaintiff must show that the defendant engaged in some arrangement or contrivance of an affirmative character designed to prevent subsequent discovery." *Id.*

The elements of a fraudulent concealment action are "(1) a material representation which is false; (2) known by defendant to be false, or made recklessly without knowledge of its truth or falsity; (3) that defendant intended plaintiff to rely upon the representation; (4) that, in fact, plaintiff acted in reliance upon it; and (5) thereby suffered injury". *McMullen v Joldersma*, 174 Mich App 207, 213; 435 NW2d 428 (1988), quoting *Jaffa v Shackett*, 114 Mich App 626, 640-641; 319 NW2d 604 (1982).

It is true that mere silence is insufficient to prove fraudulent concealment. *Sills, supra* at 310. "The plaintiff must plead in the complaint the acts or misrepresentations that comprised the fraudulent concealment." *Id.* I believe that plaintiff's allegations are sufficient to avoid summary disposition at this stage regarding whether defendant fraudulently concealed a possible claim against him. There are questions of fact regarding whether defendant fraudulently concealed a cause of action against him by affirmatively taking steps to relocate Burkholder so Burkholder's conduct in an individual parish would not be discovered by church members. As plaintiff alleged in his complaint, the allegations of the widespread sexual abuse of altar boys and other young church members did not become known until victims began to come forward years later. This gives credence to plaintiff's argument that defendant was able to prevent plaintiff and

others from discovering any claims against him by moving Burkholder around to other parishes so that Burkholder's conduct would not be disclosed. The only way that plaintiff otherwise could have discovered his possible cause of action against defendant was to reveal to others that he was sexually abused by his priest.

Plaintiff's allegations demonstrate that defendant did more than simply remain silent. Defendant is alleged to have taken affirmative steps to mitigate liability for Burkholder's conduct by moving him around. The West Virginia case of *Miller v Monongalia Co Bd of Ed*, 210 W Va 147; 556 SE2d 427 (2001), is factually similar to this case and instructive. In *Miller*, the West Virginia Supreme Court of Appeals held that plaintiff had sufficiently alleged fraudulent concealment when the defendant knew that a teacher had sexually abused a child before the plaintiff was abused and concealed evidence of its knowledge, including transferring the teacher between districts and destroying evidence, to prevent the victims, including the plaintiff, from initiating lawsuits. *Id.* at 149, 151. The fact that plaintiff was aware of his sexual abuse years before he filed this action does not affect this argument.

Our Supreme Court has held that a plaintiff relying on fraudulent concealment must exercise reasonable diligence to discover a cause of action. If the plaintiff was negligent in failing to timely discover the claim, fraudulent concealment will not apply. *McNaughton v Rockford State Bank*, 261 Mich 265, 269-270; 246 NW 84 (1933). Questions of concealment and diligence, however, are questions of fact. *Int'l Union United Automobile Workers of America v Wood*, 337 Mich 8, 13; 59 NW2d 60 (1953). There is no evidence in the existing record to show that plaintiff should have pursued a claim against defendant simply because defendant was Burkholder's employer. It may well be that defendant will ultimately prevail on this issue, but, as indicated, the existing record does not mandate a conclusion that plaintiff was on reasonable notice that defendant played a role in his treatment by Burkholder simply because defendant was Burkholder's employer.

I am aware, as defendant argues, that several jurisdictions have concluded that, once a plaintiff is on notice of a possible cause of action, he must diligently investigate his claims against all possible defendants. Although admittedly a close question in this case, I do not believe that MCL 600.5855 should be read so narrowly. Instead, a limitations period applicable to a claim may be tolled under MCL 600.5855 if the identity of another tortfeasor is fraudulently concealed, which is what plaintiff alleges occurred in this case.

I would affirm.

/s/ Harold Hood